LIBRARY
SUPREME COURT, U. S.

AUG 21 1974

MICHAEL RODAK, JR., CLE

Supreme Court of the United States

No. 74-150

October Term, 1974

EDDIE LOUIS JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

OVID LEWIS
Case Western Reserve Law School
11075 East Boulevard
Cleveland, Ohio 44106
Counsel for Petitioner

THOMAS L. JACOBS
1012 Midwestern National Building
75 Public Square
Cleveland, Ohio 44113
Attorney for Petitioner (Court Appointed)

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Table of Authorities II

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statute Involved 2

Statement of Facts 2

Argument for Allowance of Writ 4

I. The United States Court of Appeals for the Sixth Circuit Has Sanctioned Procedures in Direct Conflict with the Holding of Michelson v. United States 4

A. The Michelson Rule of In Camera Inspection of the Accused's Arrest Record by the Trial Court Was Disregarded by the Government 5

II. The United States Court of Appeals for the Sixth Circuit Has Sanctioned an Extreme Departure from the Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision 7

III. The Scope of Questioning Allowed Under the Rules of Michelson Is Presently Subject to Conflicting Constructions by the Courts of Appeals for the Fourth, Fifth and Sixth Circuits 9

Conclusion 10

Appendix 11

TABLE OF AUTHORITIES

Cases

Michelson v. United States, 335 U.S. 469 (1948) 2, 4, 5, 6, 8, 9, 10
Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965) 5
United States v. Gibson, No. CR 72-726 (Ohio 1973) 6
United States v. Grimes, 438 F.2d 391 (6th Cir. 1971) 8
United States v. Fox, 473 F.2d 131 (D.C. Cir. 1972) 6
United States v. Lewis, 482 F.2d 632 (5th Cir. 1973) 5, 7, 9
United States v. Null, 415 F.2d 1178 (4th Cir. 1969) 9
United States v. Wells, 437 F.2d 1144 (6th Cir. 1971) 5
United States v. Wooden, 420 F.2d 251 (D.C. Cir. 1969) 6
United States v. Rispo, 470 F.2d 1099 (3d Cir. 1973) 5

Statutes

28 U.S.C. § 1254(1) 13
21 U.S.C. § 841(a) 13

Miscellaneous

5 WIGMORE, EVIDENCE § 1618 (3d Ed. 1940) 7
Annot., 71 A.L.R. 1504 (1931) 7
Annot., 47 A.L.R.2d 1258 (1956) 7

Supreme Court of the United States

No. .....

October Term, 1974

EDDIE LOUIS JOHNSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

OPINIONS BELOW

Petitioner was convicted in criminal action No. CR 73-232 in the District Court of the United States, Northern District of Ohio, Eastern Division, before the Hon. Judge Thomas D. Lambros, without opinion.

Appeal was taken to the United States Court of Appeals for the Sixth Circuit in Case No. 74-1149 and the judgment of conviction was affirmed by Order of the Court on July 23, 1974, a copy of which is appended hereto. *See,* Appendix A.

JURISDICTION

The order affirming petitioner's conviction was entered on July 23, 1974. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the government's repeated cross-examination inquiries of an accused's character witness, revealing to the jury that the accused had been arrested subsequent to the offenses being tried on a charge identical to that tried, prejudicially smeared the accused's otherwise clean reputation in violation of the rule of *Michelson v. United States,* 335 U.S. 469 (1948).

STATUTE INVOLVED

21 U.S.C. § 841(a) (1970):

> Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF FACTS

A contingently paid, addict-informer, Ted Clark, also known as "Foots", testified to two purchases of narcotics from the petitioner, on August 25, 1972, and October 5, 1972, constituting the only direct evidence of the offenses charged (Tr. pp. 71, 108, 227-28 [informer was not paid on a salary basis but on a merit basis]; Tr. pp. 16, 65, 74, 75, 449-50 [informer was addicted to heroin at a cost of $18,000.00 to $27,000.00 per year]; Tr. pp. 22, 29, 74 [informer received cash payments from the government for sales to petitioner]).

Petitioner denied being present at the site of the first transaction, a busy supermarket, at the time in question (Tr. pp. 345-47 [petitioner's denial]; Tr. pp. 120, 375, 394-95 [market was busy at the time in question]). Petitioner's denial of his presence at the supermarket at the time in question was corroborated by two employees of the supermarket (Tr. pp. 376, 394-95).

The second transaction, described only by Ted Clark, the addict-informer, took place in the home of Julius Hadden, in the presence of Bruce Porter, a convicted seller of heroin (Tr. p. 252). Bruce Porter, the convicted seller of heroin, left the site while the informer was present and was not stopped or searched upon leaving (Tr. pp. 252-253). "Foots", the government's addict-informer, had previously bought drugs from John Osborne at the site of the second transaction on numerous occasions (Tr. p. 421).

Petitioner denied being present at the premises of the second transaction at any time (Tr. p. 347). Petitioner's denial was corroborated by the resident of the premises of the second transaction (Tr. p. 423).

The testimony being in conflict on key points, the petitioner put his reputation for truth and veracity and his reputation as a law-abiding citizen into issue (Tr. pp. 378-79, 400). Character witnesses testified to no knowledge of any contact with law enforcement agencies by the petitioner prior to the offenses charged (Tr. pp. 378-79, 400).

Upon cross-examination of one of the petitioner's character witnesses, Mrs. Vivian Price, the following question was asked by the government:

> "Have you ever heard that Eddie Louis Johnson was arrested for selling heroin by the Cleveland Police Narcotics Division in May of 1973?" (Tr. p. 385).

Objection and request for mistrial was then made by petitioner out of hearing of the jury (Tr. p. 385). The objection was overruled and the question was repeated by the government, this time the place of the arrest, the alleged site of the first transaction for which petitioner was being tried, was inserted into the repeated question:

> "Now, Mrs. Price, have you heard that in May of 1973, Eddie Louis Johnson was arrested for selling heroin by the Cleveland Police Department at Shantell's Superette?" (Tr. p. 390).

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. The United States Court of Appeals for the Sixth Circuit Has Sanctioned Procedures in Direct Conflict with the Holding of Michelson v. United States.

The Court is fully sensitive to the inherent difficulties which arise by allowing government prosecutors to cross-examine an accused's character witness in regard to arrests of the accused not culminated in conviction:

> [D]espite its theoretical paradoxes and deficiencies, we approve the procedure as calculated in practice to hold the inquiry within decent bounds. *Michelson v. United States*, 335 U.S. 469, 481 n.18 (1948).

It is the thrust of the present petition for writ of certiorari that these bounds have been intentionally vaulted by the government and that the explicit language of *Michelson* has been ignored by the lower courts in this action.

A. The Michelson Rule of In Camera Inspection of the Accused's Arrest Record by the Trial Court Was Disregarded by the Government.

The failure to conduct an in camera inspection of the defendant's criminal record before questioning the petitioner's character witness as to an unculminated arrest deprived the trial court of the opportunity to consider the "numerous and subtle" factors which must be evaluated before allowing the question to be asked. *United States v. Lewis*, 482 F.2d 632, 639 (5th Cir. 1973).

The discretion vested in the trial court by *Michelson* as to the issue at bar is constrained by two considerations: (1) The defendant's reputation evidence apart from the challenged question, specifically, whether there was any other criminal record in addition to the unculminated arrest, and (2) the trial court's ascertainment of the reality of the arrest from the arrest record of the defendant. *See, e.g., United States v. Wells*, 437 F.2d 1144 (6th Cir. 1971).

Without following the inspection rule a trial judge is, of course, forced to speculate as to the rest of the defendant's criminal record and reputation evidence. The trial judge is rendered incapable of following the first guideline by exercising an informed discretion. The inspection of the arrest record thus serves more than one purpose. It allows the trial court to decide whether the prior arrest will stand out alone against an otherwise clean reputation, thereby highlighting its prejudicial effect, *see, e.g., Shimon v. United States*, 352 F.2d 449, 454 (D.C. Cir. 1965), or whether the proffered arrest is merely cumulative, being but one more contact with law enforcement officials. *See, e.g., United States v. Rispo*, 470 F.2d 1099, 1102 (3d Cir. 1973). It further allows the trial court to evaluate whether the identity of the offense to that

charged will raise prejudice sufficient to destroy the probative value of the question. *United States v. Gibson*, No. CR 72-726 (Ohio N.D.E.D. 1973).

This rationale for the *in camera* inspection of the arrest record was first posited by this Court in *Michelson*:

> [It is] by comparison with the reputation asserted that a court may judge whether the prior arrest should be made subject of inquiry. *Michelson, supra*, at 184. *See, also, United States v. Fox*, 473 F.2d 131, 135 (D.C. Cir. 1972); *United States v. Wooden*, 420 F.2d 251, 252-53 (D.C. Cir. 1969).

It was upon the strength of this rationale that this court put forth a rule in mandatory terms which was ignored by the prosecutor for the government below:

> [B]efore this . . . inquiry can be made [viz., has the character witness heard of the unculminated arrest] counsel must demonstrate privately to the court . . . the reality of the arrest. *Michelson, supra, at* 481 n.18.

Without an *in camera* inspection of the accused's arrest record the discretion which is vested in the trial court degenerates into a guessing game. The government's tactic of surprise, precluding the Honorable Judge Lambros from taking into consideration the totally clean reputation of the accused prior to the offenses charged, violated both the letter and rationale of the *Michelson* rule.

II. The United States Court of Appeals for the Sixth Circuit Has Sanctioned an Extreme Departure from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

Petitioner's reputation in the community after the arrest of petitioner for the offenses tried below was tainted by that arrest and is, therefore, not competent evidence of the petitioner's reputation. This forms the rationale for the overwhelming majority rule that character witnesses can only be cross-examined as to events occurring prior to the offenses charged. *See, cases collected at* 5 WIGMORE, EVIDENCE § 1618 *at* 492-93, *n.*1 (3d Ed. 1940); Annot., 71 A.L.R. 1504, 1532-34 (1931); 47 A.L.R.2d 1258, 1300, 1302 (1956).

> [T]he community's view of the accused's character could well be affected by the gossip which frequently follows on the heels of a criminal charge, his reputation in the community after the charge became publicized might not be a trustworthy index to his actual character. *United States v. Lewis, supra,* at 641.

This rule was disregarded below. The offenses charged and tried below occurred in August and October of 1972. The arrest used to smear the petitioner's reputation occurred in May of 1973, *after* the offenses had been publicized. To allow this procedure would have the jury tease out that part of the reputation evidence which rested solely on gossip arising *before* publication of the charge or to choose only that gossip which rests on rumors not created due to the publication of the charge. The ludicrous burden this places upon a jury is plain. It is an impractical result asking mental gymnastics of jurors who are

being asked initially to only consider the evidence as it relates to the character witness's credibility. To add to this not inconsiderable burden yet another task of legalistic distinction borders on the absurd and not incidentally violates the majority rule on the subject.

More damning for the prosecutor's surprise tactic, however, is the fact that its context reveals that the question was not used to test the credibility of the character witness but was used solely and intentionally to smear the reputation of the accused. This bad faith is clear upon examining the circumstances of the arrest. It occurred at Shantell's Superette. The character witness being cross-examined had just finished testifying that she was the manager of the Superette. It was, therefore, inconceivable that an arrest which had occurred at the Superette had not come to the attention of the character witness. Under the cloak of testing the credibility of the character witness the government has thus prostituted the procedures of *Michelson* to strike at the accused. This gross deviation from the usual course of judicial proceedings must exceed the "bounds of decency" spoken of by this court if those words are to have any meaning whatsoever.

In light of the tenet set forth by this court in *Michelson,* that reputation alone can raise sufficient reasonable doubt to vindicate an accused, 335 U.S. 469, 476, and the nature of the only direct evidence used by the government in the trial below, the testimony of a contingently-paid addict informer, evidence which has been subject to numerous attacks as violative of Due Process in and of itself, *see, e.g., United States v. Grimes,* 438 F.2d 391 (6th Cir. 1971), it cannot be said that the usual course of judicial procedures can include the events which marked the proceedings below, nor that this court can countenance those events in light of the mandates of *Michelson.*

III. The Scope of Questioning Allowed Under the Rules of Michelson Is Presently Subject to Conflicting Constructions by the Courts of Appeals for the Fourth, Fifth and Sixth Circuits.

In *United States v. Null*, 415 F.2d 1178 (4th Cir. 1969) the court sanctioned the use of arrests of an accused *after* the offenses being tried in cross-examination of an accused's character witness, an issue not directly raised by *Michelson* where the arrest in question had occurred many years before the offenses being charged.

In *United States v. Lewis, supra*, at 641, the Circuit Court of Appeals for the Fifth Circuit stated the opposite rule for reasons already mentioned. It now appears that the Sixth Circuit has followed the path of the Fourth Circuit in allowing the challenged question to pass muster in petitioner's challenge below.

CONCLUSION

For the foregoing reasons this honorable court is respectfully requested to grant the writ of certiorari prayed for pursuant to Rule 19(b), Supreme Court Rules, in that

(1) The rule of this Court as announced in *Michelson v. United States*, 335 U.S. 469 (1948) was ignored below;

(2) The practice sanctioned by the Sixth Circuit is a gross deviation from the norm of judicial procedures;

(3) The Circuits are in conflict as to the scope of the questioning which should be allowed under the *Michelson* rules.

Respectfully submitted,

OVID LEWIS
Case Western Reserve Law School
11075 East Boulevard
Cleveland, Ohio 44106
Counsel for Petitioner

THOMAS L. JACOBS
JACOBS, JACOBS & ZISKIND CO., L.P.A.
1012 Midwestern National Bldg.
75 Public Square
Cleveland, Ohio 44113
Tel: 216-696-6688
Attorneys for Petitioner (Court Appointed)

APPENDIX

JUDGMENT OF THE COURT OF APPEALS

(Filed July 23, 1973)

No. 74-1149

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

EDDIE LOUIS JOHNSON,
Defendant-Appellant.

ORDER

Before: EDWARDS and ENGEL, *Circuit Judges,* and GRAY,* *District Judge.*

On receipt and consideration of the briefs, record and oral arguments in the above-styled case; and

Noting that this is an appeal from a conviction on two counts of forbidden sale of heroin, in violation of 21 U.S.C.A. §841(a) (1970); and

Finding evidence from which the jury could appropriately have found appellant guilty on each count beyond a reasonable doubt; and

---

*Honorable Frank Gray, Jr., Chief United States District Judge for the Middle District of Tennessee, sitting by designation.

Noting that appellant's character witness was cross-examined about the present reputation of appellant after testifying that appellant's reputation was that of a law-abiding citizen, *Michelson v. United States*, 335 U.S. 469 (1948); and

Finding no prejudicial or reversible error in this record,

The judgment of conviction is affirmed.

Entered by order of the Court

/s/ JOHN P. HEHMAN
Clerk

JUDGMENT AND COMMITMENT

(Dated October 24, 1973)

No. CR 73-232

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

EDDIE LOUIS JOHNSON

On this 24th day of October, 1973 came the attorney for the government and the defendant appeared in person and by Thomas Jacobs, counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and a finding of guilty has been convicted of the offense of distribution of narcotic controlled substance in violation of 21 U.S.C. §841(a)(1) as charged in Counts I & II of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of six (6) years on each Count and the defendant shall become eli-

gible for parole after serving 1/3 of the above sentence pursuant to 18 U.S.C. §4208(a)(1) and special parole conditions of 6 years as noted under 21 U.S.C. §841(b).

The sentence on both counts shall be run concurrently with one another.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ THOMAS D. LAMBROS
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-150

EDDIE LOUIS JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in allowing the government to cross-examine his character witness as to an arrest of petitioner that occurred subsequent to petitioner's arrest for the offense for which he was on trial.

Petitioner was convicted in the United States District Court for the Northern District of Ohio on two counts of selling heroin, in violation of 21 U.S.C. 841(a). He was sentenced to concurrent terms of six years' imprisonment on each count. The court of appeals affirmed (Pet. App.).

The principal evidence against petitioner consisted of the testimony of an informant, Ted Clark, who testified that he had purchased quantities of heroin from petitioner on two separate occasions in 1972 (Tr. 20-24, 26-30).[1] Both transactions were made by the informant in cooperation with federal narcotics agents. Although the agents did not observe the actual transfer of heroin on either occasion, Clark was thoroughly searched before and after his contacts with petitioner (Tr. 20, 24, 30, 165, 174, 178, 209) and the place where the transactions occurred was kept under surveillance (Tr. 110-112, 124-128, 166-167).

Petitioner took the stand in his own defense, denying that he had sold heroin to Clark or that he had been present at the scene of either transaction (Tr. 345-348, 361-363).

Petitioner called Mrs. Vivian Price as a character witness. On direct examination Mrs. Price testified as to petitioner's present good reputation in the community, both for veracity and as a law-abiding citizen.[2] On cross-examination the witness was asked if she had "ever heard

---

[1] "Tr." refers to the reporter's transcript of the trial.

[2] Q. Will you tell us what is his reputation for truthfulness in the community?

A. Well, everyone seems to like Eddie, and when they speak of him, they speak of him as being a well-mannered young man. And that's the way I feel about him, too.

Q. Do you have the means of knowing his reputation for being a law-abiding citizen?

A. Yes.

Q. Will you tell the Court and the jury *what that reputation is*? [Emphasis added; Tr. 378-379]

that [petitioner] was arrested for selling heroin by the Cleveland Police Narcotics Division in May of 1973?" (Tr. 385). Petitioner objected. During the bench conference that followed, it was established that petitioner was arrested in May of 1973 for selling heroin (Tr. 385-389). The objection was overruled. Following a cautionary instruction to the jury,[3] the prosecutor reiterated the following question (Tr. 390-391):

> Now, Mrs. Price, have you heard that in May of 1973, [petitioner] was arrested for selling heroin by the Cleveland Police Department at Shantell's Superette?

Subsequent character witnesses confined their testimony to petitioner's reputation for veracity (Tr. 400-401, 481-484, 486-489).

In his instructions to the jury, the trial judge once again explained the limited purpose for which evidence of petitioner's offense could be considered (Tr. 544-545).

Petitioner contends that the trial court erred in allowing the government to cross-examine his character witness concerning an arrest that occurred subsequent to his arrest for the offense for which he was being tried. Specifically, petitioner contends that the court contravened the procedures prescribed in *Michelson* v. *United States,* 335 U.S. 469, by failing to conduct an *in camera* inspection of his arrest record and by allowing the cross-examination to include evidence of his present reputation as a law-abiding citizen. He also contends that the circuits are in conflict in applying *Michelson.*

---

[3]"However, members of the jury, this line of questioning and the responses has limited evidentiary value. You shall not consider this testimony as it bears on the guilt or innocence of the accused, but it is admitted solely for the purpose of testing this witness's knowledge of the defendant's reputation for being a law-abiding citizen, and any inquiry at this with respect to the extent of her knowledge or lack thereof of the opinion previously expressed as to truthfulness and law-abiding nature of the defendant are admitted solely as it bears on the weight and credibility of this witness's recollection and knowledge of the defendant's reputation for these character traits" (Tr. 390).

1. Petitioner's contention that an *in camera* inspection must be held prior to the government's cross-examination concerning a previous arrest misconstrues *Michelson*, which simply requires that the court "ascertain, out of presence of the jury, that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendant's reputation" (335 U.S. at 481). Here, the trial court complied with this prescription. Immediately following the initial question, a bench conference was held at which it was ascertained that the arrest had in fact occurred. Moreover, the court prefaced the reiterated question with a cautionary instruction explaining the limited purpose for which the question was allowed; it again included a similar instruction in its final charge to the jury.

2. Petitioner's contention that the trial court erred in allowing the jury to consider evidence of his reputation in the community subsequent to the offense for which he was tried is unwarranted in light of the content of the direct examination, during which the character witness was allowed to testify as to petitioner's reputation as a law-abiding citizen at the time of the trial. The court thereupon exercised its discretion soundly in allowing the cross-examination to "take in as much ground as the testimony it is designed to verify." *Michelson, supra,* 335 U.S. at 484. Had the government been restricted to a narrower scope of cross-examination, petitioner would have improperly profited by a "mere parade of partisans" (*id.* at 479). See *United States* v. *Null,* 415 F. 2d 1178, 1179-1180 (C.A. 4).

3. Contrary to petitioner's contention, there is no conflict among the circuits in applying *Michelson*. In *United States* v. *Lewis*, 482 F. 2d 632, 643 (C.A. D.C.), the trial court erred in issuing an advisory ruling which permitted cross-examination of character witnesses as to the defendant's arrest subsequent to the offense for which he was standing trial because its ruling was made before it knew which aspects of the defendant's reputation the witnesses intended to testify about, or whether the reputation would be attested as of the date of the offense or some later time. In the present case, however, the court knew precisely what ground had been traversed on direct examination before defining the permissible scope of cross-examination.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10